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No. 86-91

In the Supreme Court of the United States

OCTOBER TERM, 1986

JACK JERSAWITZ, PETITIONER

v.

THE WARDEN OF ATLANTA PENITENTIARY, WILLIAM NOONAN, AND THE UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that a Bureau of Prisons regulation governing media access to federal prisoners impermissibly discriminates among broadcast journalists.

1. Petitioner, a self-styled independent journalist, sought a judgment declaring unconstitutional a Bureau of Prisons regulation governing press access to federal prisoners. The United States District Court for the Northern District of Georgia upheld the constitutionality of the regulation and granted summary judgment to respondents (Pet. App. 1-7). The court of appeals affirmed (*id.* at 8-14).

a. The pertinent facts are summarized in the opinion of the court of appeals (Pet. App. 9-10). Petitioner produced an editorial-type television show called "Let's Tell It Like It Is." He utilized a public access channel operated by Prime Cable, Channel 12, in Atlanta to project his show. He was not an employee of Channel 12 and had never been employed by anyone to gather or report news. Channel 12 is independent of any major media organization. Any

citizen can walk in off the street and utilize the facilities of public access free of charge. Channel 12 does not ordinarily supervise the taping of anyone's show, and it exercises little, if any, control over programming.

Petitioner requested permission to interview Father Roy Bourgeois, a critic of United States foreign policy, who was a prisoner confined in the Atlanta Federal Penitentiary. Petitioner intended to tape and then replay the interview on his show. The warden denied petitioner access to the penitentiary on the ground that he was not a "representative of the news media" as that term is defined in the media access regulation established by the Bureau of Prisons, 28 C.F.R. 540.2(b). The regulation governs federal prisoners' contact with the media and defines "Representatives of the News Media" as:

> [P]ersons whose principal employment is to gather or report news for:
>
> (1) A newspaper which qualifies as a general circulation newspaper in the community in which it is published. A newspaper is one of "general circulation" if it circulates among the general public and if it publishes news of a general character of general interest to the public such as news of political, religious, commercial, or social affairs. A key test to determine whether a newspaper qualifies as a "general circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes;
>
> (2) A news magazine which has a national circulation and is sold by newsstands and by mail subscription to the general public;
>
> (3) A national or international news service; or

> (4) A radio or television news program of a station holding a Federal Communications Commission license.

Petitioner concedes that he is not a "representative of the news media" as defined by the regulation.

b. Petitioner's complaint alleged essentially that the prison regulation improperly discriminates among journalists based on their employment. The district court rejected petitioner's First Amendment claim on the ground that "restrictions on media access to prisons do not abridge the First Amendment's guarantee of freedom of the press" (Pet. App. 4). With respect to the equal protection issue, the court concluded that the case did not involve a suspect class or implicate fundamental constitutional rights. Accordingly, the court rejected the "compelling state interest" analysis proposed by petitioner; instead, the court applied the "rational relationship" test. *Id.* at 3-6. The court found that the regulation met that test (*id.* at 6 (footnote omitted)):

> [T]he requirement of affiliation with a federally recognized and licensed media organization[] enables the prison to readily ascertain the credentials and responsibility of the [journalist] seeking prison access. Given the prisons' obvious need to maintain security and order within the prisons, and the need for administrative ease in implementing visitor regulations, this court holds that the government does in fact have a rational basis for its classifications.

c. The court of appeals affirmed (Pet. App. 8-14). Like the district court, it held that the regulation presented no First Amendment problem. The court of appeals explained that, under this Court's decisions in *Pell* v. *Procunier*, 417 U.S. 817 (1974), and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974), "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public" (Pet. App. 11).

cation * * * be rationally related to a legitimate state interest." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam). As discussed above, no fundamental right is implicated in this case, and petitioner does not contend that he belongs to a suspect class. Accordingly, the challenged regulation "need only rationally further a legitimate state purpose." *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

The courts below were also clearly correct in concluding that the Bureau's regulation had a rational relationship to a legitimate state interest. Indeed, the Bureau of Prisons regulation passes constitutional muster even under the strict scrutiny standard. The evidence established that the regulation's purpose in requiring radio or television journalists to be employed by an FCC licensee is to enable the prison to identify those journalists who are not likely to pose any threat to prison security without having to conduct extensive and cumbersome individual investigations of each applicant. Pet. App. 6, 12-14; Affidavit of Ira Kirschbaum, Acting General Counsel of the Bureau of Prisons (Kirschbaum Affidavit (R. 77-80)). The interests of the prison system in maintaining security and order in the prisons—particularly in a maximum security prison such as the one at issue here (see Pet. App. 13)—and in the effective administration of visitor regulations are compelling. As the Court observed in *Pell*, prison security is "central to all other correctional goals" (417 U.S. at 823), and "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials" (*id.* at 827). Given the expense and burden of case-by-case review of each journalist's credentials and record, there appears to be no less restrictive alternative;[3] certainly petitioner suggests none. For the regulation at issue to have any

[3] If the prison system may not adopt such regulations as it deems necessary in order to limit the security risk inherent in allowing press access to inmates, it might choose to withdraw completely the special

value or purpose, it must draw a line somewhere to distinguish the press from the general public.[4] We note finally that there is nothing to suggest that petitioner may not communicate with prisoner Bourgeois through alternative methods, such as by correspondence or telephone (see 28 C.F.R. 540.10 *et seq.*, 540.100 *et seq.*).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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privileges accorded the press to conduct inmate interviews—which it lawfully could do under *Pell* and *Saxbe*.

[4] The press definition in the regulation is similar to that endorsed by Justice Powell in his dissent in *Saxbe*, wherein he recognized the difficulties in proceeding on a case-by-case basis. 417 U.S. at 873-874.

[5] Petitioner argues (Pet. 8) that the regulation has the impermissible purpose under the First Amendment of assuring " 'objective or accurate reporting by responsible newsmen' " (quoting Gov't Br. App. 11; see also *id.* at 18; Kirschbaum Affidavit (R. 78)). But this seizes upon some isolated references and ignores the clear thrust of the regulation's origin and design. As the court of appeals expressly found (Pet. App. 12), "[t]he regulation was not adopted for the purpose of providing, nor can it be construed to mean, that the Bureau of Prisons could give or withhold access to the Atlanta Maximum Security Penitentiary simply on its decision whether or not a newsman would report fairly and objectively." Rather, the regulation is motivated by the " 'obvious need to maintain security and order with[in] the prison[s], and the need for administrative ease in implementing visitor regulations' " (*id.* at 13 (quoting district court opinion, *id.* at 6)). Even if the regulation were based in part on the purpose petitioner ascribes to it, and assuming arguendo that this purpose is illegitimate, still the presence of the legitimate purpose dictates that the regulation should be upheld. Cf. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 284-287 (1977).

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